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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
Petitioner,

vs.

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
Respondents.

PETITION OF THE PETITIONER FOR REHEARING WITH COPY OF OPINION.

RUSSELL H. ROBBINS,
Counsel for Petitioner.

HENRY M. DOWLING,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS, as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased,
Respondents.

PETITION FOR REHEARING.

Comes now the above named petitioner, Harry C. Moore, as Treasurer of Grant County, Indiana, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof respectfully shows:

During the residence of Richard Edwards Breed in Indiana certain personal property taxes accrued against him in favor of Grant County and other municipal subdivisions of the State of Indiana, which taxes constituted personal obligations of the said Breed. The State of Indiana, so far as it had power so to do, authorized petitioner as Treasurer of Grant County to sue for such taxes outside the State of Indiana. By a statute enacted in 1927 the State authorized county treasurers to institute and prosecute to final judg-

ment all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside the State of Indiana or by his legal representatives.

The Circuit Court of Appeals rendered an opinion to the effect that a federal court of one State will not enforce the revenue laws in another State. This Court stated that it was not necessary to express any opinion on the question considered below and affirmed the decree of the Circuit Court of Appeals on the ground that the petitioner lacked legal capacity to sue.

Rehearing is asked for the reason that petitioner believes that the conclusion reached by this Court is unsound and that petitioner did not lack legal capacity to maintain the suit.

Petitioner's alleged lack of legal capacity is predicated upon a lack of power of the State of Indiana to give any force or effect beyond her own limits to the Act purporting to authorize this suit, and is supported by citation of authority to the effect that executors, administrators and chancery receivers without title may not sue *as of right* outside the State of appointment. Such alleged lack of legal capacity seems not to be based upon the nature of the cause of action, and the supporting authority indicates that the impotence ascribed to the State to authorize suit beyond its territorial limits is not confined to revenue actions. If this is intended, the logical result of the opinion is to preclude the State from authorizing suit, or recovering, outside its territorial limits, on a cause of action of any nature. By the logic of the opinion, should Indiana purchase road machinery in New York under warranty and should such machinery prove defective, Indiana would be unable to sue in New York for breach of warranty and would be wholly unable to recover its damages except insofar as it could recover judgment and levy execution on property within the State of Indiana. Even a judgment recovered in the State of Indiana would be ineffective unless property could be found in the State to satisfy the judgment, since the State would have no greater

power to authorize suit outside its limits on the judgment than on the original cause of action. Since such a result can scarcely be contemplated, petitioner assumes that the lack of power ascribed to the State of Indiana must be limited to power to authorize suits under revenue acts.

The opinion is based, not upon a refusal to entertain the suit under the principles of comity, but upon petitioner's alleged lack of legal capacity to maintain the suit.

Instances of authority to act beyond State boundaries are not uncommon; for example, authority granted to Commissioners of Deeds of a State to take acknowledgments in other states. There is no inherent lack of power in a State to authorize suit or other actions beyond its territorial limits, and the Act of 1927 is a valid exercise by the State of Indiana of its power to authorize the maintenance of suit beyond its limits, unless a state has less power in regard to the enforcement of rights under revenue laws than under other laws. The cases cited concerning the powers of executors, administrators and chancery receivers are not pertinent unless the reasons for denying power to sue outside the state of appointment apply also to county treasurers suing under the Indiana Act of 1927.

Executors and administrators are appointed for the purpose of administering the property of decedents. Chancery receivers are, generally, appointed for the purpose of administering the property of insolvents. By orderly practice the property in each jurisdiction is administered by an officer appointed by a court of the jurisdiction. There is no essential reason for according to an executor, administrator or receiver of the primary jurisdiction power to sue outside thereof since ancillary administrators or receivers may be appointed by the courts of other jurisdictions. The cases cited in the opinion do not negative the power of a State to accord to executors, administrators or receivers authority to sue outside the territorial limits of the State (subject to the right of courts of other jurisdictions to refuse to accord comity to such executors, administrators and receivers) but

decide merely that such authority is not given. In the present case the authority to sue outside Indiana is accorded to petitioner by the State if it is possible for the State to accord such authority. Unless such authority be recognized the revenues in question are lost to Grant County and the other municipal subdivisions; there can be no ancillary appointment.

Executors, administrators and chancery receivers are appointed for the purpose of administering property for the benefit of those entitled thereto. Citizens of one State should not be compelled to seek their distributive dividends as creditors of a decedent or insolvent in a foreign jurisdiction when they have at hand the means for satisfying themselves out of property situated within the local State and such means should not be taken away from them by a foreign executor, administrator or receiver obtaining possession of the local property. An executor, administrator or receiver taking property out of the local jurisdiction without giving security for its administration and without being subject to the supervision of the local court might seriously prejudice the rights of local creditors. Suits are freely allowed, however, by those asserting claims against the property in the hands of the executor, administrator or receiver. Such is the present case. Breed's property is being administered by executors in New York. Municipal corporations of Indiana, through petitioner, assert an adverse claim. Petitioner is not seeking to obtain possession of property to administer. The case is wholly unlike that of a suit by a representative seeking to obtain property in a foreign jurisdiction and the reasons governing refusal to entertain such suits have no application.

The conclusion of the opinion, that petitioner lacks legal capacity to sue, is based upon the premise that the reasons on which rest the established practice as to executors, administrators and chancery receivers apply with full force here.

This practice, as stated in the opinion, is that federal courts in one State decline to take jurisdiction of suits by executors and administrators appointed in another State, and limit chancery receivers to suits in the jurisdiction in which they are appointed. Such practice manifestly rests upon a refusal to extend comity rather than upon lack of capacity to sue. The opinion states that executors, administrators and chancery receivers are "without authority, in their official capacity, to sue *as of right* in the federal courts of other States." (Italics ours.) Such executors, administrators and receivers can so sue only if comity is extended, and the italicized phrase indicates that the bar is not a lack of legal capacity to sue but a refusal to extend comity. If this be true it is necessary that the question be decided whether a federal court in one State will, by comity, entertain causes of action arising under the revenue laws of another State.

This Court in its opinion in *Vaughan* v. *Northup,* 15 Pet. 1, 5, indicates that the objection to suit by administrators in a jurisdiction other than that of appointment goes to comity only. The Court said:

> "Every grant of administration is strictly confined in the authority and operation to the limits of the territory of the government which grants it; and does not, *de jure,* extend to other countries. It cannot confer, *as a matter of right,* any authority to collect assets of the deceased in any other State; and *whatever operation is allowed it beyond the original territory of the grant is a mere matter of comity,* which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens." (Italics ours.)

The situation in the present case is more closely analogous to the situation presented in *Converse* v. *Hamilton,* 224 U. S. 243, than to the case of a chancery receiver. In the *Converse* case a statutory receiver of an insolvent Minnesota Corpora-

tion sued in Wisconsin to enforce an asserted double liability of two stockholders. The court said at page 257:

> "But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a *quasi*-assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that State and elsewhere. So, when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent*, a right of action, transitory in character, against one who was liable contractually and generally, if at all."

The statutory receiver in the *Converse* case, and the county treasurer in the present case, each derived his authority from a state statute, constituting the receiver a representative of creditors and the county treasurer a representative of the county and other municipal corporations, investing each with a right of action and charging each with the enforcement of such right.

In *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, which involved the power of a federal receiver to sue outside the jurisdiction of appointment, it was said at page 577: "If the powers of a chancery receiver in the Federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action." The Indiana Act of 1927 insofar as it is possible so to do clothes petitioner with power to sue outside the State of Indiana. If mere legislative authority is necessary to clothe chancery receivers with authority to sue outside the jurisdiction of appointment, any defect in the power of ordinary chancery receivers is supplied to the County treasurer in the present case.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed.

The opinion of this Court herein is appended.

Respectfully submitted,

RUSSELL H. ROBBINS,
Counsel for Petitioner.

HENRY M. DOWLING,
Of Counsel.

Certificate of Counsel.

I, RUSSELL H. ROBBINS, Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

RUSSELL H. ROBBINS,
Counsel for Petitioner.

Opinion.

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1929.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS, as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1930.]

Mr. Justice BUTLER delivered the opinion of the Court.

Petitioner is the county treasurer of Grant county, Indiana. Respondents are the executors named in the will of Richard Edwards Breed, appointed by the Surrogate's Court in the county and State of New York and there engaged in the administration of his estate. Petitioner as such treasurer brought this suit in the United States District Court for the Southern District of New York to recover $958,516.22 claimed as delinquent taxes. The respondents moved to dismiss on the grounds that the complaint failed to state a cause of action, that the court had no jurisdiction of the subject matter, and that petitioner had not legal capacity to sue. The court declined jurisdiction and entered a decree dismissing the complaint. 28 F. (2d) 997. The Circuit Court of Appeals affirmed. 30 F. (2d) 600.

From 1884 until his death on October 14, 1926, the testator was a resident and citizen of Grant county, Indiana. During the last 24 years of that period he owned stock of corporations and other intangible property in respect of which there had been no return, assessment or payment of taxes. After testator's death the county auditor acting, as it is alleged, under authority of the statutes of Indiana ascertained the value in each year of the omitted property, assessed taxes thereon for state, county, city and township purposes and charged the same against such property and the executors. By the statutes of Indiana (§ 14,299, Burns' Statutes, 1926) it is made the duty of the treasurer of each county to collect the taxes imposed therein for county, city and other purposes. By § 1, c. 54, Session Laws of 1927, county treasurers are authorized "to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana or by his legal representatives * * *". The recovery here sought is for Grant county, the city of Marion and the other political subdivisions therein of which the testator was a resident during the years for which such assessments were made.

The first question for consideration is whether petitioner had authority to bring this suit.

The United States District Court in New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of Indiana. *Grant* v. *Leach & Company,* U. S. . *Pennoyer* v. *Neff,* 95 U. S. 714, 732. And, so far as concerns petitioner's capacity to sue therein, that court is not to be distinguished from the courts of the State of New York. *Hale* v. *Allinson,* 188 U. S. 56, 68.

Petitioner claims only by virtue of his office. Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit or to the other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes. And, as Indiana laws are the sole source of petitioner's authority, it

follows that he had none in New York. Mechem, Public Offices and Officers, § 508. *State* v. *Scott*, 182 N. C. 865, 873. He is the mere arm of the State for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that State. It is well understood that they are without authority, in their official capacity, to sue as of right in the federal courts in other States. From the earliest time, federal courts in one State have declined to take jurisdiction of suits by executors and administrators appointed in another State. *Dixon's Executors* v. *Ramsey's Executors*, 3 Cranch 319, 323. *Kerr* v. *Moon*, 9 Wheat, 565, 571. *Vaughan* v. *Northup*, 15 Pet. 1, 5. And since the decision of this Court in *Booth* v. *Clark*, 17 How. 322, it has been the practice in federal courts to limit such receivers to suits in the jurisdiction in which they are appointed. *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 578. *Converse* v. *Hamilton*, 224 U. S. 243, 257. *Sterrett* v. *Second National Bank*, 248 U. S. 73, 76. The reasons on which rests this long established practice in respect of executors, administrators and such receivers apply with full force here. We conclude that petitioner lacked legal capacity to sue. It is not necessary to express any opinion upon the question considered below, whether a federal court in one State will enforce the revenue laws of another State.

Decree affirmed.